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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-606

CITY OF MISSION, SOUTH DAKOTA; AND
MISSION GOLF COURSE, INC.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF OF THE PETITIONERS

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TABLE OF CONTENTS

	Page
ARGUMENT.	1
CONCLUSION.	8

TABLE OF AUTHORITIES

Cases:

Dabney v. Montgomery Ward & Co., Inc., 692 F.2d 49 (8th Cir. 1982).	6
Edgar v. Finley, 312 F.2d 533 (8th Cir. 1963).	7
Norfolk Redevelopment and Housing Authority v. C & P Telephone Co. of Va., 52 U.S.L.W. 4007 (November 1, 1983)	3
United States v. Mazurie, 419 U.S. 544 (1975).	3
United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. denied, ____ U.S. ____ (1982).	7
United States v. South Dakota, 7 Indian L. Reporter 3148 (D.S.D. Sept. 8, 1980).	7
United States v. Walus, 616 F.2d 283 (8th Cir. 1980).	7

Statute:

18 U.S.C. §§ 1154(c) & 1156.	1

ARGUMENT

The Response of the United States to the Petition vividly illustrates some of the pervasive and serious consequences of the decision of the court below. To begin with, the United States acknowledges that under the analysis espoused by the lower court, application of the "non-Indian communities" provision (18 U.S.C. §§ 1154(c) & 1156) is not "static." Brief for the United States In Opposition at 9. Indeed, as the provision is now being applied, it is easy to envision different results obtaining in different years with changes in such factors as federal programs and demographic characteristics. Because the analysis employed by the lower court is so easily susceptible of fluctuation, there is no foreseeable end to litigation either in this particular case or in this context generally. A major fear of both the Petitioners and the Amici States

is that the decision below will in fact invite more litigation in this area. See, e.g., Petition at 14-15. It is fair to say then, that the approach used by the lower court does not allow for the certainty and predictability so important in the jurisdictional context. While the Petitioners are certainly not suggesting that application of the provision should, once determined, be permanently set, it is unlikely that Congress intended that application of the provision would be an ever-changing process, continually causing jurisdictional confusion and uncertainty as is occurring now. See, e.g., Brief of the States of South Dakota, et al., as Amici Curiae in support of the Petition.

This leads to a second major deficiency in the approach espoused by the lower court. It is true, as the United States points out, that application of the provision is, to

some extent at least, "fact-sensitive" (Br. for U.S., at 11). See, e.g., United States v. Mazurie, 419 U.S. 544 (1975). This factual examination, however, should not displace the threshold inquiry required when examining a federal enactment -- congressional intent. It is this inquiry which gives the statutory provision at issue form and substance, and at the same time, provides the Court with important perspective and guidance. See, e.g., Norfolk Redevelopment and Housing Authority v. C & P Telephone Co. of Va., 52 U.S.L.W. 4007, 4009 (Nov. 1, 1983) (statutory language to be interpreted "'in light of the purposes Congress sought to serve.' ..."). Yet, in the instant proceeding, the lower court applied the non-Indian community provision without conducting this crucial analysis, and the United States now advocates that such an analysis would be "misdirected." Br. for

U.S., at 8. From the Petitioners' perspective, it is precisely because this inquiry was not conducted here that there is now uncertainty and confusion.

While the United States disclaims that the analysis of the lower court rests upon the assumption that a community is a monolithic entity separate of other communities (Br. for U.S., at 11), its application produces precisely that result. As the term "community" is a broad, flexible one, there is commonly more than one community in any area (e.g., business, social, cultural, political, educational). These communities may overlap with one another or one may be located entirely within another. Under the analysis of the lower court, however, a geographic area with any common interests is defined as the one referent community, and that community is

then examined to determine whether it is Indian or non-Indian. See Pet. App. at 19a-20a. In view of the flexibility and breadth of the term, the more realistic approach would be to examine the various types of communities actually existing in the area and assess their non-Indian character. It may well be that Congress did not intend that the non-Indian community provision would encompass all communities as the term is ordinarily understood; more likely, Congress probably had political and economic communities primarily in mind. Nevertheless, it is evident that the approach espoused by the lower court results in an unnecessarily constricted application of the term "community" which is not rooted

in reality.[1]

Lastly, the United States unfairly suggests that the Motion recently filed by the City of Mission and Mission Golf Course in the District Court, under Rule 60(b)(2) of the Federal Rules of Civil Procedure, to set aside the judgment on the basis of newly discovered historical documentation, makes this case "all the less suitable for review by this Court." Br. for U.S., at 9. While the Petitioners believe that their motion is a substantial one, it is important to keep in mind that Rule 60(b)(2) motions are generally looked upon with "'disfavor'" in the Eighth Circuit. Dabney v. Montgomery

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1. The United States also argues that while corporate limits are not dispositive, they are relevant to the inquiry. Br. for U.S., at 7. On the contrary, if "cohesiveness" is to be the sole focus of inquiry as the United States suggests (Br. for U.S., at 7), it is difficult to conceive of when corporate boundaries would ever be relevant.

Ward & Co., Inc., 692 F.2d 49, 52 (8th Cir. 1982), quoting Edgar v. Finley, 312 F.2d 533, 536 (8th Cir. 1963). And, when such motions are denied, the denial is subject to reversal on appeal for abuse of discretion only. See, e.g., United States v. Walus, 616 F.2d 283, 288 (8th Cir. 1980). It is evident then, that the instant Petition may well be the only time that the City and Golf Course can present the merits of their case to the Court for review. Therefore, the Rule 60(b)(2) motion should not play a role in the consideration and disposition of the Petition.[2]

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2. One last point bears mention here. While the United States correctly observes that the Court of Appeals in United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. denied, ____ U.S. ____ (1982), thought that the community issue had not been raised in the court below (Br. for U.S., at 10), it is apparent that the District Court did in fact consider that issue. See United States v. South Dakota, 7 Indian

CONCLUSION

WHEREFORE, for the foregoing reasons, and for the reasons set forth in the Petition and the supporting States' Amici Brief, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December 20, 1983

(cont.)

L. Reporter 3148, 3149 (D.S.D. Sept. 8, 1980) ("The State's second principal contention is that the housing project is so closely related to the City of Sisseton that it could not possibly be considered a dependent Indian community....").

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